IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

FRIDAY, THE 23RD MARCH 2007 / 2ND CHAITHRA 1929

RCRev..No. 55 of 2007()

RCA.11/2004 of DISTRICT COURT,KOLLAM
RCP.14/1998 of RENT CONTROL COURT, KARUNAGAPPALLY
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: PETITIONER/APPELLANT:

PAVITHRAN, AGED 48, S/O.SREEDHARAN,
KOOTHARAYYASSERIL HOUSE, PARAYAKADAVUTHURA,
ALAPPAD VILLAGE, KARUNAGAPPALLY.

BY ADV. SRI.N.DHARMADAN (SR.)
SMT.D.P.RENU
SRI.RANJITH XAVIER

RESPONDENTS:
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1. ASHA, AGED 42,
LATE C. RAMACHANDRAN PILLAI, PERMANENT RESIDENT
OF HOUSE NO.142, TANKA STREET, SIVANDA COLONY,
COIMBATORE, NOW RESIDING AT KOCHAYYATHU
THEKKATHIL (RADHIKAM), BEARING NO.K.P.11.41,
PADANAYARKULANGARA NORTH, KARUNAGAPPALLY.

2. ANITHA, AGED 40,
LATE C. RAMACHANDRAN PILLAI,
PERMANENT RESIDENT OF HOUSE NO.142,
TANKA STREET, SIVANDA COLONY, COIMBATORE,
NOW RESIDING AT KOCHAYYATHU THEKKATHIL(RADHIKAM)
BEARING NO.K.P.11.41,KARUNAGAPPALLY.

3. ANIL KUMAR, AGED 39,
D/O.LATE C. RAMACHANDRAN PILLAI, PERMANENT RESIDENT OF HOUSE NO.142, TANKA STREET, SIVANDA COLONY, COIMBATOSRE, NOW RESIDING AT KOCHAYYATHU THEKKATHIL (RADHIKAM)BEARING NO.K.11.41, PADANAYARKUALNGARA NORTH,KARUNAGAPALLY

4. ANAND KUMAR, AGED 38,
D/O.LATE C. RAMACHANDRAN PILLAI, PERMANENT RESIDENT OF HOUSE NO.142, TANKA STREET, SIVANDA COLONY, COIMBATORE, NOW RESIDING AT KOCHYYATHU THEKKATHIL (RADHIKAM) BEARING NO.K.P.11.41, PADANAYARKULANGARA NORTH, KARUNAGAPPALLY.

5. ANURADHA, AGED 38,
D/O.C. RAMACHANDRAN PILLAI, PERMANENT RESIDENT OF HOSE NO.142, TANKA STREET, SIVANDA COLONY, COIMBATORE, NOW RESIDING AT KOCHAYYATHU THEKKATHIL (RADHIKAM), BEARING NO.K.P.11.41, PADANAYARKULANGARA NORTH, KARUNAGAPPALLY.

6. SANTHA RAMACHANDRAN, AGED 66,
W/O.LATE C. RAMACHANDRAN PILLAI, PERMANENT RESIDENT OF HOUSE NO.142, TANKA STREET, SIVANDA COLONY, COIMBATORE, NOW RESIDING AT KOCHYYATHU THEKKATHIL (RADHIKAM), BEARING NO.KP.11.41, PADANAYARKULANGARA NORTH, KARUNAGAPPALLY.

BY ADV. SRI.VPK.PANICKER

THIS RENT CONTROL REVISION HAVING BEEN FINALLY HEARD ON 5/03/2007, THE COURT ON 23/3/2007 PASSED THE FOLLOWING:

Order on IA 798/07 in RCR 55/07

Dismissed.

Sd/- P.R.Raman, Judge.
Sd/- Antony Dominic, Judge.

23.3.2007.

P.R.Raman & Antony Dominic, JJ.

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R.C.R.No.55 of 2007

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Dated this the 23rd day of March, 2007.

ORDER

Antony Dominic,J.

The tenant in RCP No. 14 of 1998 on the file of the Rent Control Court, Karunagapally, whose eviction was ordered under Section 11 (3) of the Kerala Building (Lease and Rent Control) Act 1965 and confirmed in RCA No.11 of 2004, by the Rent Control Appellate Authority, Kollam, is the revision petitioner. The parties are referred to as they are arrayed in the Rent Control Petition.

2. The tenanted premises belonged to late Ramachandran Pillai, as per Partition Deed No.299/1980 and Sale Deed No.3523/1983. By Ext.A2 rent deed dated 10.10.1987 the petition scheduled residential building was leased out to the respondent, for a monthly rent of Rs.700/-. Subsequently, on 15.10.1991 the monthly rent was enhanced Rs.1050/- on the execution of Ext.A3 renewed rent deed. In March 1994 when the landlord started construction of a commercial building on the western portion of the scheduled building, on his request, the respondent surrendered two rooms, which since then, remained in the exclusive possession and use of the landlord. It would appear that during this period the landlord and his family were in Coimbatore and were engaged in business. In 1995, landlord was affected with Alzhmer's and following medical advice, the family wanted to set up residence at their native place, Karunagappally. It is said that the

business was wound up for shifting their residence as stated above and the 6th petitioner herein, the wife of the landlord, requested for surrender of vacant possession of the petition scheduled building, for own occupation. While the tenant did not comply with the demand, O.S.No.458 of 1995 was filed alleging that he was going to be forcefully evicted. However, the suit was withdrawn subsequently.

3. On the strength of a power of attorney issued by Sri.Ramachandran Pillai, the 6th petitioner filed RCP OP 4/96 seeking the eviction of the tenant, but this was later withdrawn on 31.10.1997 with liberty to file a fresh petition. It is stated that Ramachandran Pillai died on 14.07.1998, and as a result of which, the petitioners herein being the legal heirs, became the owners of the property and they demanded surrender of vacant possession for their own occupation as they had no other residential building of their own in Karunagappally. It is stated that subsequently petitioners 1, 3 and 4 left India in search of employment and petitioners 2, 5 and 6 started residence in a rented house from 24.11.1998 onwards. It is also alleged that since October 1997 rent was not paid. The petitioners also stated that they are willing to offer a room in the first floor of their shopping complex to the tenant, to which he could shift his office. In the aforesaid circumstances, seeking eviction of the tenant, urging grounds under Section 11(2) and (3) of the Act, the petition was filed.

4. The respondent contested the petition and contended that the petitioners were not residing at Karunagappally as alleged but were residing in a palatial house of theirs at Coimbatore, continuing business there, as before. It was stated that he had given a deposit of Rs.20,000/- on 10.10.1987 and that rent was subsequently increased. The allegation that the respondent had surrendered two rooms in the petitioner scheduled

building was denied. It was contended that RCP OP 4/96 was filed on a false power of attorney. The tenant also contended that there was no bonafides in the need urged and that the tenant was depending on the business carried on in the petition scheduled building for his livelihood and that no other suitable building was available in the locality. The allegation of arrears of rent was also denied. It was stated that the rooms in the first floor of the commercial complex offered by the petitioners was not suitable for his business as paint and other hardware items could not be stored in the room offered. On this basis the respondent sought dismissal of the petition.

5. After marking Exts. A1 to A26 on behalf of the petitioners, Exts.C1 and C2 Commission Reports and examining PWs 1 and 2, the Rent Control Court by its order dated 31st October 2003 allowed the petition, finding ground under Section 11(3) in favour of the petitioners. It is to be noted that the tenant did not adduce any evidence nor did he produce any document in support of his contentions. Aggrieved by the order of the Rent Control Court, the tenant filed RCA No.11/2004, which was also dismissed by judgment dated 21st August 2006. It is aggrieved by the aforesaid orders, the respondent has filed this revision petition.

6. On behalf of the respondent, we heard Mr. M. Dharmadan, Sr. Counsel. The Learned Senior Counsel would submit that the need urged by the landlords was not bonafide, in as much as, they continued their residence at Coimbatore carrying on business there. It was also urged that the case set up by the landlords that they were staying in a rented premises at Karunagappally was also factually incorrect and that it was not proved by any cogent evidence. Learned Senior Counsel referred us to the

judgments reported in **Subhadra** v. **Gopalakrishna Naidu** - ILR 1978 (2) Kerala 104, **Muhammed Basheer** v. **A. Mujeeb Rahman** - 2005 (2) KLJ 475 and **Pratap Rai Tanwani** v. **Uttam Chand** - 2005(1) 124, in support of his plea that the need urged by the petitioners was not bonafide. According to him, since the landlords were already in occupation of two rooms surrendered by the tenant, as the need urged was for additional accommodation, a petition under Section 11(8) of the Act alone is maintainable and for that reason, the petition filed under Section 11(3) deserves to be dismissed. The Learned Senior Counsel also submitted that the respondent was not afforded an opportunity to contest his case by adducing evidence in support of his contentions.

7. On the other hand, the counsel who entered on behalf of the respondents submitted that the ground under Section 11(3) was proved by adducing cogent evidence, both oral and documentary. It was contended that the tenant did not have a case of having surrendered any portion of the building and hence the plea of maintainability of the petition under Section 11(3) had no substance. It was stated that the tenant was always adopting dilatory tactics and chose not to adduce any evidence and therefore the plea that there was denial of opportunity was incorrect.

8. We have considered the submissions made by the counsel for both sides.

9. As we have already noted, the ground of eviction found against the tenant is under Section 11(3) of the Act. On behalf of petitioners, the evidence of PWs 1 and 2 and exhibits A20 to A26 are referred to by the Rent Control Court in this behalf. PW1, is the 6th petitioner and PW2 is the

landlord of the rented premises where the petitioners are now residing at Karunagappally. Resisting the contention under Section 11(3), the main argument of the respondent was that the petitioners were residing in their palatial house at Coimbatore where they were carrying on their business establishment, 'Cleopatra'. This has been examined by the Rent Control Court in the light of the evidence available. The Rent Control Court has referred to Ext.A20 rent receipt, Ext.A21 covering letter, Ext.A25 rent deed executed by PW1 in favour of PW2, Ext.A26, sale deed by which the petitioners had disposed of their residential building in Coimbatore. Further Ext.A22 is a copy of TP(OP)85/2001 filed by the respondent against the petitioners before the District Court, in which their address was stated as Kochaiyyathu Thekkethil House, Pada-North, Karunagappally, the place where the petitioners were claiming to be residing on rent. The evidence also disclosed that pursuant to Ext.A24 notice issued by the landlord of the aforesaid premises, they vacated the said premises and taken on rent another building bearing No.KP/443, Thaleekkal Veedu in Padayanarkulangara Vadakkummury, Karunagappally, and this was supported by Ext.A25 rent receipt issued by the landlord of the premises in favour of the 6th petitioner.

10. In addition to the documentary evidence discussed above, the evidence of PW1, the 6th petitioner, which disclosed inter-alia that petitioners 2, 5 and 6 were residing in the aforesaid rented premises and that the 2nd petitioner has been given in marriage in 2002. The evidence further disclosed that the 6th petitioner mother was living alone with the 5th petitioner, an epilepsy patient, in the rented premises. PW2 is the owner of the house, where the petitioners were residing in Karunagappally, through whom Ext.X1 rent deed was also proved. As against the evidence thus adduced by the petitioners, the respondent did not choose to adduce any

evidence, either oral or documentary. It was on the strength of the aforesaid evidence that the Rent Control Court has considered the bonafide need urged by the landlords and entered a finding in their favour.

11. In the Rent Control Appeal filed by the respondent, the correctness of this finding of the Rent Control Court was examined by the Appellate Authority. In addition to the evidence as discussed by the Rent Control Court, the Appellate Authority also took note of the fact that the landlord had offered a room to the tenant in the 1st floor of their commercial building, which was refused by the tenant insisting on an allotment in the ground floor itself. It is the admitted case that the respondent who is engaged in business of hardware, paints, building materials etc., was using the petition scheduled premises only as an office and not for any other purpose. His refusal to occupy the room in the first floor offered by the petitioners is quite ununderstandable. The Appellate Authority made reference to Exts.C1 and C2 reports. C1 had given the details of the petition scheduled building, while C2 gave the details of the premises occupied on rent by the landlords, which indicated that this was a very small house. The oral evidence tendered has also been taken note of, especially that PW2 had deposed that he had asked for surrender of the building now occupied by the petitioners. In view of its finding that the petitioners had come back to Karunagappally and that they had no other house of their own, taking into account the fact that even the tenant had no case that the landlords had any other building in their possession for occupation, the Appellate Authority entered a finding that there was nothing to show that the claim of the landlord was a dishonest one. It was on this basis that the finding of the Rent Control Court under Section 11(3) was affirmed. In view of the evidence in the case as discussed above, we cannot find fault with the finding entered by the Rent Control Court under Section 11(3), as affirmed

by the Rent Control Appellate Authority.

12. One of the contentions urged by the Learned Senior Counsel was that the petition filed urging ground under Section 11(3) was not maintainable as the landlords were already in possession of two rooms surrendered by the tenant. Learned Senior Counsel relied on the judgment of a Division Bench of this Court reported in **Indian Saree House** v. **Radhalakshmy** – 2006(3) K.L.T. 129. On going through the order of the Rent Control Court we find that no such ground has been urged. However, this contention was pressed into service at the appellate stage and the Appellate Authority has considered this contention in paragraphs 8 to 10 of its judgment. It is rightly held that throughout the proceedings the tenant was contending for the position that the entire building was in his possession and that there was no surrender of any portion. Even in the evidence, a case to the contrary was not attempted. The memorandum of appeal also was to that effect. In such circumstances, the Rent Control Appellate Authority held that in the absence of any plea it was unnecessary to consider this contention which was raised only as an after thought. Having considered this submission of the Learned Senior Counsel, we fully endorse the view taken by the Appellate Authority that in the absence of any case to that effect, it was not necessary for entertaining that plea, raised for the first time at the appellate stage. The respondent cannot be allowed to shift his stand, suiting his convenience at various stages of the proceedings.

13. The Rent Control Court also examined whether the respondent is entitled to the benefit of the 2nd proviso to Section 11(3) of the Act. It was noted that the petition scheduled premises was used as an office and not

as a showroom for his hardware and paint business which was conducted by the tenant in another building on the side of the National Highway. Ext.C1 report mentioned that other suitable buildings are available in the nearby vicinity for the respondent to shift his office. Added to this, inspite of the fact that there was no statutory obligation, the landlords were willing to give a room in the first floor of their shopping complex to the respondent for a reasonable rent for shifting his office. As already noted the tenant has not adduced evidence much less that he was depending for his livelihood mainly on the income derived from the business carried on the petition schedule building and that suitable building were not available. The tenant did not dispute the availability of the room offered by the landlord but only contended that big barrels of paints and hardware items cannot be taken to the room offered as the stair case was narrow. This contention lacked bonafides as the petition scheduled premises was used only as an office and not as a godown. The Rent Control Court in the aforesaid circumstances held that the tenant did not discharge his burden to prove his entitlement to the benefit of the 2nd proviso to Section 11(3). Considering this issue, the Rent Control Appellate Authority in paragraph 23 of its order, upheld the finding. In the aforesaid circumstance we cannot but, agree with the findings as entered into by the Rent Control Court and as affirmed by the Appellate Authority.

14. It was inter-alia contended by the tenant that the building in question was a commercial building. This contention has been considered by the Rent Control Court and rightly rejected by it referring to Exts.A2 and A3 and Ext.A10, A14, Commission Reports submitted by Advocate Commissioner's appointed in O.S.No. 458/1995 and RCP (OP) No.4/996.

15. The Learned Senior Counsel argued before us that the tenant did not

have an opportunity to adduce evidence and that an application for time on 15.109.2003 supported by a medical certificate was made in the Rent Control Court. According to counsel declining the request, without examining the respondent, the Rent Control Petition was allowed by the Rent Control Court. Initially we were also disturbed by the complaint of the Senior Counsel but however, on going through the order of the Rent Control Court, we realize that the respondent himself is only to be blamed for the alleged loss of opportunity. The Rent Control Court has recorded that at the stage when the case was posted in the list for trial on 07.09.2001, the respondent had filed TP (OP) 85/2001, before the District Court, Kollam and had obtained a stay. Subsequently, the aforesaid petition seeking transfer of the case was dismissed by the District Court, by its order dated 29.06.2002. Thereafter, so many opportunities were given to the respondent to take pre-trial steps and finally the case was included in the special list for trial on 01.09.2003. Inspite of it, even witness schedule was not filed by the respondent in time. It was in the aforesaid circumstances, the Rent Control Court concluded that the attempt of the respondent was only to protract the case one way or the other. We notice that a complaint in this behalf was not urged before the Appellate Authority and therefore we do not find any bonafides in the complaint now urged before us. The respondent who was only interested in protracting the proceedings cannot now seek any leniency in the matter.

16. In fact, the Sr. Counsel urged before us that an Advocate Commissioner should be appointed by us to prove his point that the petitioners were not residing at Karunagappally as stated by them. As we have already noted Ext.C2 is a Commission Report, which refers to the building occupied by petitioners. Added to this, is the evidence produced as Exts.A20 to A26. In addition to this, even the landlord of the present

premises occupied by the petitioners has been examined as PW2. While such evidence has been tendered by the petitioners, the respondent has chosen not to produce any document or adduce any evidence. In the aforesaid circumstances, we do not find it necessary that this Court should appoint an Advocate Commissioner on a point where there is no dearth of evidence, which will only delay the proceedings further.

In the aforesaid circumstances, we find no merit in this revision petition and the same will stand dismissed.

P.R.Raman,
Judge.

Antony Dominic
Judge.

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After we pronounced the order, counsel for the revision petitioner made a request for time to allow her client to surrender vacant possession of the premises to the landlord. Having heard the counsel for the landlord, we allow the tenant three months time from today to surrender vacant possession of the premises to the landlord subject to the following conditions:

(i) that the tenant shall file an affidavit before the Execution

Court within two weeks from today undertaking to vacate the premises on or before 23rd June, 2007;

(ii) that the tenant shall not induct any third parties into the building till vacant possession is given to the landlord; and

(iii) that the tenant shall continue to pay an amount equivalent to the rent towards use and occupation.

In case the tenant fails to comply with any of the above conditions, it will be open to the landlord to execute the order of eviction forthwith.

P.R.Raman,
Judge.

Antony Dominic,
Judge.

23rd March, 2007.

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